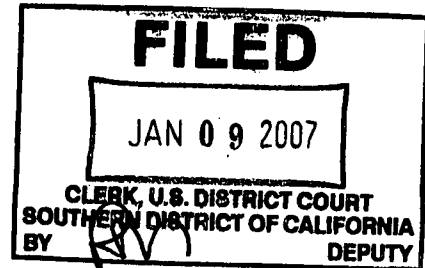


ORIGINAL

1 JOHN S. ADLER, Bar No. 060398
 2 LITTLER MENDELSON
 3 A Professional Corporation
 4 501 W. Broadway
 Suite 900
 San Diego, CA 92101.3577
 Telephone: 619.232.0441

5 Attorneys for Defendants
 6 DIAMOND ENVIRONMENTAL SERVICES, LLC
 AND ERIC DE JONG



8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA

10 JUAN MENDOZA and AGUSTIN
 11 FERNANDEZ, individually and on behalf
 of all other persons similarly situated and
 on behalf of the general public,

12 Plaintiffs,

13 v.

14 DIAMOND ENVIRONMENTAL
 15 SERVICES, LLC, a California limited
 liability company; ERIC DE JONG, an
 16 individual; and DOES 1 through 100,
 inclusive,

17 Defendants.
 18

Case No. **07CV 0056 BTM POR**

**NOTICE TO FEDERAL COURT OF
 REMOVAL OF CIVIL ACTION**

San Diego Superior Court – North County
 Case No. GIN 057664

19 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND PLAINTIFFS JUAN MENDOZA
 20 AND AGUSTIN FERNANDEZ AND THEIR ATTORNEYS OF RECORD:

21 PLEASE TAKE NOTICE that, pursuant to Title 28 of the United States Code,
 22 sections 1441 and 1446, Defendants DIAMOND ENVIRONMENTAL SERVICES, LLC and ERIC
 23 DE JONG (“Defendants”) hereby remove to this Court the civil action filed and currently pending in
 24 the Superior Court of the State of California for the County of San Diego, North County Judicial
 25 District entitled Juan Mendoza and Agustin Fernandez, individually and on behalf of all other
 26 persons similarly situated and on behalf of the general public v. Diamond Environmental Services,
 27 LLC, a California limited liability company; Eric De Jong, an individual; and Does 1 through 100,
 28 inclusive, Case No. GIN 057664.

1 Defendants will promptly file in said Superior Court its Notice to State Court and all
 2 Adverse Parties of Removal of Civil Action, a true and correct copy of which (without
 3 accompanying exhibits) is attached hereto as Exhibit "A." This case is being removed to this Court
 4 based on federal question jurisdiction.

5 The grounds for removal are as follows:

6 1. On or about December 11, 2006, a civil action was commenced against
 7 Defendants in the Superior Court of the State of California for the County of San Diego, North
 8 County Judicial District entitled Juan Mendoza and Agustin Fernandez, individually and on behalf of
 9 all other persons similarly situated and on behalf of the general public v. Diamond Environmental
 10 Services, LLC, a California limited liability company; Eric De Jong, an individual; and Does 1
 11 through 100, inclusive; Case No. GIN 057664 (hereinafter the "State Court action"). A true and
 12 correct copy of the Complaint filed in the State Court action is attached hereto as Exhibit "B."

13 2. Within a week following the filing of the Complaint herein, Defendants were
 14 served with a Summons and a copy of the Complaint. A copy of the Summons as to the LLC
 15 Defendant is attached hereto as Exhibit "C." In addition to the aforementioned documents,
 16 Defendant was also served with a Notice of Case Assignment, and documents related to ADR, true
 17 and correct copies of which are attached hereto as Exhibit "D."

18 3. Exhibits "B", "C," and "D" constitute all of the papers served upon
 19 Defendants and/or filed in the State Court action, except as noted at paragraph 4, infra.

20 4. Defendants timely filed their Answer to Plaintiff's Complaint ("Answer") on
 21 January 8, 2007. A true and correct copy of the Answer is attached hereto as Exhibit "E."

22 5. This Notice to Federal Court of Removal of Civil Action is timely filed within
 23 thirty (30) days after the receipt by Defendants of a copy of the initial pleading which sets forth the
 24 removable claim. See 28 U.S.C. § 1446(b).

25 6. Defendants designated as Does 1 – 100 are fictitious defendants, are not
 26 parties to this action, have not been served and are to be disregarded for the purpose of this removal.
 27 28 U.S.C. § 1441(a). McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987). Said
 28

1 defendants, therefore, need not consent to this removal. All named Defendants request this removal
2 action.

3 7. The United States District Court for the Southern District of California has
4 original jurisdiction over the claims alleged in this State Court action under 28 U.S.C. sections 1331
5 and 1332(a)(1) and (c)(1) because Plaintiff's claims arise under federal law as follows:

6 (a) Plaintiffs filed their Class Action Complaint for Damages and
7 Injunctive Relief on December 11, 2006, alleging claims for the following:

- 8 1) Failure to Pay Overtime Compensation;
- 9 2) Failure to Pay Final Wages;
- 10 3) Waiting Time Penalties;
- 11 4) Failure to Provide Rest Periods;
- 12 5) Failure to Allow Meal Periods;
- 13 6) Failure to Furnish Timely and Accurate Wage Statements; and
- 14 7) Unlawful and Unfair Business Acts and Practices in Violation of
15 California Business & Professions Code §17200, *et seq.*

16 (b) At paragraph 2, plaintiffs claim entitlement to and seek recovery of
17 "overtime pay under the applicable wage and hour laws" including 29 U.S.C. section 207, a federal
18 statute.

19 (c) At paragraph 5, plaintiffs claim entitlement to and seek recovery for
20 defendants' failure to furnish "timely itemized wage statements," "as required by ... 29 U.S.C.
21 § 211(c)," a federal statute.

22 (d) At paragraph 11, plaintiffs claim entitlement to relief under 29 U.S.C.
23 sections 207 and 211(c), and recognize jurisdiction in the federal court for these claims.

24 (e) At paragraph 23, plaintiffs invoke the definitional effect of 29 U.S.C. §
25 203(d), a federal statute, as to the status of individually-named defendant de Jong.

26 (f) At paragraph 36, plaintiffs state their claim for "overtime compensation
27 as required by the California's wage and hour laws and 29 U.S.C. § 207," a federal statute.
28

1 (g) At paragraph 52, plaintiffs state their overtime compensation claim
2 under 29 U.S.C. § 207.

3 (h) At paragraph 87, plaintiffs base their unlawful business acts and
4 practices claim, in pertinent part, on 29 U.S.C. §§ 207 and 211 (c), federal statutes.

5 8. Because plaintiff's civil action falls within the Court's original jurisdiction
6 under Title 28 of the United States Code, sections 1331, 1332 and 1337(a), and is removable to this
7 Court under Title 28 of United States Code, sections 1367(a) and 1441(a)(b) and (c).

8 9. Because the United States District Court for the Southern District of
9 California has original jurisdiction over this lawsuit pursuant to Title 28 of the United States Code,
10 sections 1331, 1332 and 1337(a), the action may be removed in its entirety pursuant to Title 18 of
11 the United States Code, sections 1441(a), (b), (c) and (e). In addition, the Court has supplemental
12 and/or pendent jurisdiction over all state claims that are so related to claims in the action within its
13 original jurisdiction that they form part of the same controversy, pursuant to Title 28 of the United
14 States Code, section 1367(a).

15 10. Because Plaintiffs' action involves claims arising under the laws of the United
16 States, it may be removed to this Court under the provisions of Title 28 of the United States Code,
17 sections 1441(b) and 1446.

18 11. Venue is proper in this Court in that this is the court for the district embracing
19 the place where the action is pending in state court. 28 U.S.C. § 1441(a).

20 12. No bond is required for removal. 28 U.S.C. § 1446(d); Rezendes v. Dow
21 Corning Corp., 717 F.Supp. 1435, 1438 n.2 (E.D. Cal. 1989).

22 ////

23 ////

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1 WHEREFORE, Defendants, and each of them, hereby remove said civil action from
2 the Superior Court of the State of California for the County of San Diego, North County Judicial
3 District, to this District Court.

4 Dated: January 8, 2007
5

6
7 
8 JOHN S. ADLER
9 LITTLER MENDELSON
10 A Professional Corporation
11 Attorneys for Defendants
12 DIAMOND ENVIRONMENTAL SERVICES,
13 LLC AND ERIC DE JONG
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1 JOHN S. ADLER, Bar No. 060398
LITTLER MENDELSON
2 A Professional Corporation
501 W. Broadway
3 Suite 900
San Diego, CA 92101.3577
4 Telephone: 619.232.0441

5 Attorneys for Defendants
DIAMOND ENVIRONMENTAL SERVICES, LLC
6 AND ERIC DE JONG

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO – NORTH COUNTY

10 JUAN MENDOZA and AGUSTIN
FERNANDEZ, individually and on behalf
11 of all other persons similarly situated and
on behalf of the general public,

12 Plaintiffs,

13 v.
14

15 DIAMOND ENVIRONMENTAL
SERVICES, LLC, a California limited
liability company; ERIC DE JONG, an
16 individual; and DOES 1 through 100,
inclusive,

17 Defendants.
18

Case No. GIN 057664

Assigned to:
The Honorable Michael B. Orfield
Dept. 28

**NOTICE TO STATE COURT AND ALL
ADVERSE PARTIES OF REMOVAL OF
CIVIL ACTION**

Complaint Filed: December 11, 2006

19 TO THE CLERK OF THE ABOVE-ENTITLED COURT, AND TO PLAINTIFFS JUAN
20 MENDOZA AND AGUSTIN FERNANDEZ AND THEIR ATTORNEYS OF RECORD:

21 PLEASE TAKE NOTICE that on January 9, 2007, Defendants Diamond
22 Environmental Services, LLC and Eric de Jong filed their Notice of Removal of Civil Action on the
23 Basis of Federal Jurisdiction in this action in the office of the Clerk of the United States District
24 Court for the Southern District of California.

25 ////

26 ////

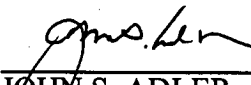
27 ////

28 ////

1 A true and correct copy of said Notice with all attachments/exhibits is attached hereto
2 and served herewith.

3 The filing of said Notice in Federal Court, together with the filing of a copy of said
4 Notice with this Court, effects the removal of this action in accordance with 28 U.S.C. section
5 1446(d).

6 Dated: January 9, 2007

7
8 
9 _____
10 JOHN S. ADLER
11 LITTLER MENDELSON
12 A Professional Corporation
13 Attorneys for Defendants
14 DIAMOND ENVIRONMENTAL SERVICES,
15 LLC AND ERIC DE JONG
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SUMMONS (CITACION JUDICIAL)

SUM-100

NOTICE TO DEFENDANT:

(AVISO AL DEMANDADO):

DIAMOND ENVIRONMENTAL SERVICES, LLC, a California limited liability company; ERIC DE JONG, an individual; and DOES 1 through 100, inclusive,

YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTÁ DEMANDANDO EL DEMANDANTE):

JUAN MENDOZA and AGUSTIN FERNANDEZ, individually and on behalf of all other persons similarly situated and on behalf of the general public,

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

2006 DEC 11 PM 4:31

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

CASE NUMBER:
(Número del Caso)

GIN 057664

The name and address of the court is:

(El nombre y dirección de la corte es):

Superior Court of the State of California
325 S. Melrose
Vista, CA 92081

North County

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Jason E. Baker, Esq.
KEEGAN MACALUSO & BAKER, LLP
4370 La Jolla Village Drive, Suite 640
San Diego, California 92122

DATE: DEC 11 2006

(Fecha)

Clerk, by

C. Torricuaz

(Secretario)

Deputy

(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

(SEAL)

NOTICE TO THE PERSON SERVED: You are served

- ☐ as an individual defendant.
- ☐ as the person sued under the fictitious name of (specify):

- ☒ on behalf of (specify): DIAMOND ENVIRONMENTAL SERVICES, LLC,
a California limited liability company

- under:
- | | |
|---|---|
| <input type="checkbox"/> CCP 416.10 (corporation) | <input type="checkbox"/> CCP 416.60 (minor) |
| <input type="checkbox"/> CCP 416.20 (defunct corporation) | <input type="checkbox"/> CCP 416.70 (conservatee) |
| <input type="checkbox"/> CCP 416.40 (association or partnership) | <input type="checkbox"/> CCP 416.90 (authorized person) |
| <input checked="" type="checkbox"/> other (specify): a California limited liability company | |

- ☐ by personal delivery on (date):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

INDEPENDENT CALENDAR CLERK

325 S. Melrose
Vista, CA 92081

TO:

JASON E BAKER
KEEGAN MACALUSC & BAKER LLP
4370 LA JOLLA VILLAGE DRIVE SUITE 640
SAN DIEGO, CA 92122

JUAN MENDOZA

Plaintiff(s)

vs.

DIAMOND ENVIROMENTAL SERVICES, LLC
Defendant(s)

Case No.: GIN057664

NOTICE OF CASE ASSIGNMENT

Judge: MICHAEL B. ORFIELD
Department: 28
Phone: 760-806-6347

COMPLAINT FILED 12/11/06

IT IS THE DUTY OF EACH PLAINTIFF (AND CROSS-COMPLAINANT) TO SERVE A COPY OF THIS NOTICE WITH THE COMPLAINT (AND CROSS-COMPLAINT).

ALL COUNSEL WILL BE EXPECTED TO BE FAMILIAR WITH SUPERIOR COURT RULES WHICH HAVE BEEN PUBLISHED AS DIVISION II, AND WILL BE STRICTLY ENFORCED.

TIME STANDARDS: The following timeframes apply to general civil cases and must be adhered to unless you have requested and been granted an extension of time. General civil consists of all cases except: Small claims appeals, petitions, and unlawful detainers.

COMPLAINTS: Complaints must be served on all named defendants, and a CERTIFICATE OF SERVICE (SDSC CIV-345) filed within 60 days of filing. This is a mandatory document and may not be substituted by the filing of any other document. (Rule 2.5)

DEFENDANT'S APPEARANCE: Defendant must generally appear within 30 days of service of the complaint. (Plaintiff may stipulate to no more than a 15 day extension which must be in writing and filed with the Court.) (Rule 2.6)

DEFAULT: If the defendant has not generally appeared and no extension has been granted, the plaintiff must request default within 45 days of the filing of the Certificate of Service. (Rule 2.7)

THE COURT ENCOURAGES YOU TO CONSIDER UTILIZING VARIOUS ALTERNATIVES TO LITIGATION, INCLUDING MEDIATION AND ARBITRATION, PRIOR TO THE CASE MANAGEMENT CONFERENCE. MEDIATION SERVICES ARE AVAILABLE UNDER THE DISPUTE RESOLUTION PROGRAMS ACT AND OTHER PROVIDERS. SEE ADR INFORMATION PACKET AND STIPULATION.

YOU MAY ALSO BE ORDERED TO PARTICIPATE IN ARBITRATION PURSUANT TO CCP 1141.10 AT THE CASE MANAGEMENT CONFERENCE. THE FEE FOR THESE SERVICES WILL BE PAID BY THE COURT IF ALL PARTIES HAVE APPEARED IN THE CASE AND THE COURT ORDERS THE CASE TO TO ARBITRATION PURSUANT TO CCP 1141.10. THE CASE MANAGEMENT CONFERENCE WILL BE CANCELLED IF YOU FILE FORM SDSC CIV-359 PRIOR TO THAT HEARING.

ALSO SEE THE ATTACHED NOTICE TO LITIGANTS.

CERTIFICATE OF SERVICE

I certify that I am not a party to the above-entitled case; on the date shown below, I served this notice on the parties shown by personally handing it to the attorney or their personal representative at
California. VISTA

DATED: 12/11/06

BY: CLERK OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

INDEPENDENT CALENDAR CLERK

325 S. Melrose
Vista, CA 92081

TO:

JUAN MENDOZA

Plaintiff(s)

vs.

DIAMOND ENVIROMENTAL SERVICES, LLC
Defendant(s)

Case No.: GIN057664

**STIPULATION TO USE OF
ALTERNATIVE DISPUTE
RESOLUTION PROCESS
(CRC 1590.1)**

Judge: MICHAEL B. ORFIELD
Department: 28

The parties and their attorneys stipulate that the matter is at issue and the claims in this action shall be submitted to the following alternative dispute resolution process. Selection of any of these options will not delay any case management time-lines.

- | | |
|---|---|
| <input type="checkbox"/> Court-Referred Mediation Program | <input type="checkbox"/> Court-Ordered Nonbinding Arbitration
(Cases valued at \$50,000 or less) |
| <input type="checkbox"/> Private Neutral Evaluation | <input type="checkbox"/> Court-Ordered Binding Arbitration (Stipulated) |
| <input type="checkbox"/> Private Mini-Trial | <input type="checkbox"/> Private Reference to General Referee |
| <input type="checkbox"/> Private Summary Jury Trial | <input type="checkbox"/> Private Reference to Judge |
| <input type="checkbox"/> Private Settlement Conference With Private Neutral | <input type="checkbox"/> Private Binding Arbitration |
| <input type="checkbox"/> Other (specify): _____ | |

It is also stipulated that the following shall serve as arbitrator, mediator or other neutral: (Name) _____

Alternate: (mediation & arbitration only) _____

Date: _____

Date: _____

Name of Plaintiff _____

Name of Defendant _____

Signature _____

Signature _____

Name of Plaintiff's Attorney _____

Name of Defendant's Attorney _____

Signature _____

Signature _____

(Attach another sheet if additional names are necessary). It is the duty of the parties to notify the court of any settlement pursuant to California Rules of Court, Rule 225. Upon notification of the settlement the court will place this matter on a 45-day dismissal calendar.

No new parties may be added without leave of court and all unserved, non-appearing or actions by named parties are dismissed.

IT IS SO ORDERED.

Dated: _____

JUDGE OF THE SUPERIOR COURT

NOTICE TO LITIGANTS/ADR INFORMATION PACKAGE

You are required to serve a copy of this Notice to Litigants/ADR Information Package and a copy of the blank Stipulation to Use of Alternate Dispute Resolution Process (received from the Civil Business Office at the time of filing) with a copy of the Summons and Complaint on all defendants in accordance with San Diego Superior Court Rule 2.5, Division II and CRC Rule 201.9.

ADR POLICY

It is the policy of the San Diego Superior Court to strongly support the use of Alternative Dispute Resolution ("ADR") in all general civil cases. The court has long recognized the value of early case management intervention and the use of alternative dispute resolution options for amenable and eligible cases. The use of ADR will be discussed at all Case Management Conferences. It is the court's expectation that litigants will utilize some form of ADR - i.e. the court's mediation or arbitration programs or other available private ADR options as a mechanism for case settlement before trial.

ADR OPTIONS

1) CIVIL MEDIATION PROGRAM: The San Diego Superior Court has established a Civil Mediation Program to replace the Mediation Pilot Program established by Code of Civil procedure sections 1730 et seq. The Civil Mediation Program, in effect for cases filed on or after May 1, 2003 or upon stipulation, is designed to assist parties with the early resolution of their dispute. All general civil independent calendar cases, including construction defect, complex and eminent domain cases are eligible to participate in the program. Limited civil collection cases are not eligible at this time. San Diego Superior Court Local Rule 2.31, Division II addresses this program specifically. Mediation is a non-binding process in which a trained mediator 1) facilitates communication between disputants, and 2) assists parties in reaching a mutually acceptable resolution of all or part of their dispute. In this process, the mediator carefully explores not only the relevant evidence and law, but also the parties' underlying interests, needs and priorities. The mediator is not the decision-maker and will not resolve the dispute -- the parties do. Mediation is a flexible, informal and confidential process that is less stressful than a formalized trial. It can also save time and money, allow for greater client participation and allow for more flexibility in creating a resolution.

Assignment to Mediation, Cost and Timelines: Parties may stipulate to mediation at any time up to the CMC or may stipulate to mediation at the CMC. Mediator fees and expenses are split equally by the parties, unless otherwise agreed. Mediators on the court's approved panel have agreed to the court's payment schedule for court-referred mediation: \$150.00 per hour for each of the first two hours and their individual rate per hour thereafter. Parties may select any mediator, however, the court maintains a panel of court-approved mediators who have satisfied panel requirements and who must adhere to ethical standards. All court-approved mediator fees and other policies are listed in the Mediator Directory at each court location to assist parties with selection. **Discovery:** Parties do not need to conduct full discovery in the case before mediation is considered, utilized or referred. **Attendance at Mediation:** Trial counsel, parties and all persons with full authority to settle the case must personally attend the mediation, unless excused by the court for good cause.

2) JUDICIAL ARBITRATION: Judicial Arbitration is a binding or non-binding process where an arbitrator applies the law to the facts of the case and issues an award. The goal of judicial arbitration is to provide parties with an adjudication that is earlier, faster, less formal and less expensive than trial. The arbitrator's award may either become the judgment in the case if all parties accept or if no trial de novo is requested within the required time. Either party may reject the award and request a trial de novo before the assigned judge if the arbitration was non-binding. If a trial de novo is requested, the trial will usually be scheduled within a year of the filing date.

Assignment to Arbitration, Cost and Timelines: Parties may stipulate to binding or non-binding judicial arbitration or the judge may order the matter to arbitration at the case management conference, held approximately 150 days after filing, if a case is valued at under \$50,000 and is "at issue". The court maintains a panel of approved judicial arbitrators who have practiced law for a minimum of five years and who have a certain amount of trial and/or arbitration experience. In addition, if parties select an arbitrator from the court's panel, the court will pay the arbitrator's fees. Superior Court Local Rules Division II Chapter III and Code of Civil Procedure 1141 et seq. address this program specifically.

3) SETTLEMENT CONFERENCES: The goal of a settlement conference is to assist the parties in their efforts to negotiate a settlement of all or part of the dispute. Parties may, at any time, request a settlement conference before the judge assigned to their case; request another assigned judge or a pro tem to act as settlement officer; or may privately utilize the services of a retired judge. The court may also order a case to a mandatory settlement conference prior to trial before the court's assigned Settlement Conference judge.

4) OTHER VOLUNTARY ADR: Parties may voluntarily stipulate to private ADR options outside the court system including private binding arbitration, private early neutral evaluation or private judging at any time by completing the "Stipulation to Use Alternative Dispute Resolution Process" which is included in this ADR Package. Parties may also utilize mediation services offered by programs that are partially funded by the county's Dispute Resolution Programs Act. These services are available at no cost or on a sliding scale based on need. For a list of approved DRPA providers, please contact the County's DRPA program office at (619) 338-2797.

ADDITIONAL ADR INFORMATION: For more information about the Civil Mediation Program, please contact the Civil Mediation Department at (619) 515-8908. For more information about the Judicial Arbitration Program, please contact the Arbitration Office at (619) 531-3818. For more information about Settlement Conferences, please contact the Independent Calendar department to which your case is assigned. Please note that staff can only discuss ADR options and cannot give legal advice.

1 Jason E. Baker, Esq. (SBN: 197666)
Peter Karvelis, Esq. (SBN: 216299)
2 Brent Jex, Esq. (SBN: 235251)
KEEGAN, MACALUSO & BAKER, LLP
3 4370 La Jolla Village Drive, Suite 640
San Diego, CA 92122
4 Telephone: (858) 552-6750
Facsimile: (858) 552-6749
5

6 Attorneys for Plaintiffs and Class Members
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO - NORTH COUNTY

10 JUAN MENDOZA and AGUSTIN)
FERNANDEZ, individually and on behalf of all)
11 other persons similarly situated and on behalf of)
the general public,)

12 Plaintiffs,
13

14 vs.

15 DIAMOND ENVIRONMENTAL SERVICES,)
LLC, a California limited liability company;)
16 ERIC DE JONG, an individual; and DOES 1)
through 100, inclusive,)

17 Defendants.
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Case No.

GIN 057664

CLASS ACTION COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF
FOR:

- 1) Failure to Pay Overtime Compensation;
- 2) Failure to Pay Final Wages;
- 3) Waiting Time Penalties;
- 4) Failure to Provide Rest Periods;
- 5) Failure to Allow Meal Periods;
- 6) Failure to Furnish Timely and Accurate Wage Statements; and
- 7) Unlawful and Unfair Business Acts and Practices in Violation of California Business & Professions Code §17200, *et seq.*

1 Plaintiffs Juan Mendoza and Agustin Fernandez ("Plaintiffs"), on behalf of themselves and
2 all others similarly situated, complain and allege against Diamond Environmental Services LLC
3 (hereinafter "Diamond"), and all other Defendants, as follows:

4
5 **I**
INTRODUCTION

6 1. This is a class action under Code of Civil Procedure § 382, seeking unpaid overtime
7 compensation and interest thereon, compensation for missed meal periods, compensation for failure
8 to furnish timely statements accurately showing total hours worked, waiting time penalties,
9 injunctive and other equitable relief, and reasonable attorneys' fees and costs, under California Labor
10 Laws, Industrial Welfare Commission Wage Orders and the Fair Labor Standards Act of 1938.
11 Plaintiffs, on behalf of themselves and the Class Members, also seek injunctive relief and restitution
12 on behalf of all benefits Defendants have enjoyed from their failure to pay overtime compensation,
13 their failure to provide adequate meal breaks, under Business and Professions Code §§ 17200 *et seq.*

14 2. Defendants have treated all of their Pumper Drivers as exempt from California's
15 overtime pay requirements and have refused to pay the Class Members overtime, notwithstanding
16 the fact that all such Pumper Drivers are not exempt and are indeed entitled to overtime pay under
17 the applicable wage and hour laws, including Sections 510, 558, 1194, and 1197 of the California
18 Labor Code, California Industrial Welfare Commission ("I.W.C.") Wage Order Nos. 4-98 and
19 4-2000, and 29 U.S.C. § 207.

20 3. Since at least December 15, 2002, Defendants did not afford their full time Pumper
21 Drivers proper meal periods, as required by Labor Code §§ 226.7 and 512 and I.W.C. Wage Order
22 No. 4-2000. The Pumper Drivers are owed an additional hour of pay at their regular rate for each
23 day they did not take lawful meal periods.

24 4. Plaintiffs and Class Members were not and are not exempt from California's overtime
25 and meal period requirements.

26 5. Since at least December 15, 2002, Defendants did not furnish each of their full time
27 Pumper Drivers with timely itemized wage statements accurately showing total hours worked by
28 each such Pumper Driver, as required by Labor Code § 226 and 29 U.S.C. § 211(c). Each Pumper

1 Driver is owed fifty dollars (\$50) for the initial pay period in which Defendants failed to provide a
2 statement showing total hours worked and one hundred dollars (\$100) for each subsequent pay
3 period, up to a total of four thousand dollars (\$4000).

4 6. Defendants have willfully failed and refused, and continue to fail and refuse, to timely
5 pay wages due for overtime compensation to former Pumper Drivers at the conclusion of their
6 employment with Defendants, entitling these former employees to statutory penalties under Labor
7 Code §§ 201-203.

8 **II.**
9 **JURISDICTION**

10 7. This Court has jurisdiction over Plaintiffs' and Class Members' claims for unpaid
11 overtime wages under California Labor Code § 1194.

12 8. This Court has jurisdiction over Plaintiffs' and Class Members' claims for penalties
13 for failure to pay wages of discharged employees under Labor Code § 203.

14 9. This Court has jurisdiction over Plaintiffs' and Class Members' claims for meal
15 period violations under Labor Code §§ 218 and 221.

16 10. This Court has jurisdiction over Plaintiffs' and Class Members' claims for injunctive
17 relief and restitution of ill-gotten benefits arising from Defendants' unlawful business practices under
18 Business & Professions Code §§ 17203 and 17204.

19 11. This Court has concurrent jurisdiction under 29 U.S.C. § 216(b) over Plaintiffs' and
20 Class Members' claims for unpaid overtime wages under 29 U.S.C. § 207 and failure to keep
21 adequate time records under 29 U.S.C. § 211(c).

22 12. There is no federal diversity jurisdiction because there is not complete diversity as
23 between the Plaintiffs and the Defendants since both Plaintiffs and Defendants are citizens of
24 California.

25 **III.**
26 **VENUE**

27 13. Venue as to each Defendant is proper in this judicial district, pursuant to Code of
28 Civil Procedure § 395(a). Defendant is a California limited liability company and maintains
headquarters or other offices, transacts business, and/or has an agent in San Diego County, and each

1 Defendant is otherwise within this Court's jurisdiction for purposes of service of process. The
2 unlawful acts alleged herein have a direct effect on Plaintiffs and those similarly situated within the
3 State of California and within San Diego County. Defendants operate an office in San Diego County
4 as well as in other counties within the State of California and employ numerous Class Members in
5 San Diego County. Moreover, the Plaintiffs herein reside in San Diego County, and are or were
6 employed by Defendants in San Diego County.

7
8 **IV.**
PARTY ALLEGATIONS

9 **A. Plaintiff And Class Representative Juan Mendoza.**

10 14. Plaintiff Juan Mendoza is an adult resident of San Diego County, California. During
11 the Class period stated herein, plaintiff Juan Mendoza was employed by Defendants as a "Pumper
12 Driver" at Diamond's facility located in San Marcos, California. Specifically, plaintiff Juan
13 Mendoza began his employment as a Pumper Driver on or about October 1, 2002. His duties
14 primarily consisted of attending shift meetings, driving a truck to work sites through San Diego
15 County to service portable restrooms, pumping waste from portable restrooms, cleaning portable
16 restrooms, restocking portable restrooms, and maintaining the service truck he drove. Juan
17 Mendoza's employment with Diamond ended on or about August 1st, 2004.

18 15. From in or about October 1, 2002 until his departure in or about August 1, 2004,
19 Plaintiff Mendoza, like other similarly situated Class Members, was paid a fixed amount of "salary"
20 per month, and he was not paid an hourly wage.

21 16. During the Class Period, Plaintiff Mendoza regularly worked in excess of forty (40)
22 hours per week, but was not properly paid overtime compensation for all hours worked in excess of
23 forty (40) hours per week in accordance with Wage Order Nos. 4-98 and 4-2000.

24 17. During the Class Period, Plaintiff Mendoza was not afforded meal breaks in
25 accordance with Labor Code § 512. Plaintiff Mendoza regularly worked in excess of five (5) hours
26 per day and was not afforded a half-hour meal period in which he was relieved of all duties. He
27 regularly worked in excess of ten (10) hours a day and was not afforded a second half-hour meal
28 period in which he was relieved of all duties. Defendants also did not timely pay overtime

1 compensation and other unpaid wages due to Plaintiff Mendoza at the conclusion of his employment
2 in violation of California Labor Code §§ 201-203.

3 **B. Plaintiff And Class Representative Agustin Fernandez:**

4 18. Plaintiff Agustin Fernandez is an adult resident of San Diego County, California.
5 During the Class period stated herein, plaintiff Agustin Fernandez was employed by Defendants as
6 a Pumper Driver at Diamond's facility located in San Marcos, California. Specifically, plaintiff
7 Agustin Fernandez began his employment as a Pumper Driver on or about December 1, 2001. His
8 duties primarily consisted of attending shift meetings, driving a truck to work sites through San
9 Diego County to service portable restrooms, pumping waste from portable restrooms, cleaning
10 portable restrooms, restocking portable restrooms, and maintaining the service truck he drove.
11 Agustin Fernandez' employment with Diamond ended on or about December 1, 2004.

12 19. From in or about December 1, 2001 until his departure in or about December 1, 2004,
13 Plaintiff Fernandez, like other similarly situated Class Members, was paid a fixed amount of "salary"
14 per month, and he was not paid an hourly wage.

15 20. During the Class Period, Plaintiff Fernandez regularly worked in excess of forty (40)
16 hours per week, but was not properly paid overtime compensation for all hours worked in excess of
17 forty (40) hours per week in accordance with Wage Order Nos. 4-98 and 4-2000.

18 21. During the Class Period, Plaintiff Fernandez was not afforded meal breaks in
19 accordance with Labor Code § 512. Plaintiff Fernandez regularly worked in excess of five (5) hours
20 per day and was not afforded a half-hour meal period in which he was relieved of all duties. He
21 regularly worked in excess of ten (10) hours a day and was not afforded a second half-hour meal
22 period in which he was relieved of all duties. Defendants also did not timely pay overtime
23 compensation and other unpaid wages due to Plaintiff Fernandez at the conclusion of his
24 employment in violation of California Labor Code §§ 201-203.

25 **C. Defendant Diamond Environmental Services, LLC.**

26 22. Plaintiffs allege on information and belief that Defendant Diamond is a limited
27 liability company organized under the laws of the State of California on July 23, 1997, with its
28 principle place of business located at 605 East Mission Road, San Marcos, California 92069.

1 Defendant Diamond employed Plaintiffs and similarly situated persons as Pumper Drivers at its
2 principle place of business and other work sites located in California. Plaintiffs allege on
3 information and belief that at all times relevant hereto, there is and was such a unity of interest and
4 ownership in Diamond by defendant Eric de Jong that the separate personalities of the Company and
5 the individual no longer exists, and that, if the acts alleged in this Complaint are treated as those of
6 the Company alone, an inequitable result will follow. Specifically, defendant Eric de Jong has full
7 ownership in Diamond; dominates and controls Diamond; Eric de Jong is the President/CEO,
8 Secretary, Treasurer/CFO, Principal Member, or Director of Diamond; Eric de Jong is responsible
9 for the supervision and management of Diamond; possesses sole ownership of Diamond; and has
10 intentionally violated the applicable labor laws while using the Company veil of Diamond as a shield
11 against personal liability.

12 **D. Individual And "Alter Ego" Defendant Eric de Jong.**

13 23. Plaintiffs allege on information and belief that Defendant Eric de Jong is an adult
14 resident of San Diego County, California. Defendant Eric de Jong is the sole owner and Member
15 of Diamond. Defendant Eric de Jong is the President/CEO, Secretary, Treasurer/CFO, Principal
16 Member, or Director of Diamond. Defendant Eric de Jong, in his position as the sole owner,
17 member, and director of Diamond, was in the business of employing, managing, supervising,
18 controlling and directing "pumper drivers" working at Diamond's work sites, and is an employer of
19 Diamond's "pumper drivers" as defined under 29 U.S.C. § 203 (d) and under the "economic reality"
20 doctrine. Defendant Eric de Jong, in his position as the sole owner, member, and director of
21 Diamond, does business in California and in this judicial district.

22 **E. DOES 1-100.**

23 24. The true names and capacities, whether individual, corporate, associate, or otherwise,
24 of defendants sued herein as DOES 1 through 100, inclusive, are currently unknown to Plaintiffs,
25 who therefore sue defendants by such fictitious names under Code of Civil Procedure § 474.
26 Plaintiffs are informed and believe, and based thereon allege, that each of the Defendants designated
27 herein as a DOE is legally responsible in some manner for the unlawful acts referred to herein.
28 Plaintiffs will seek leave of court to amend this complaint to reflect the true names and capacities

1 of the Defendants designated hereinafter as DOES when such identities become known.

2 25. Plaintiffs are informed and believe, and based thereon allege, that each Defendant
3 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint
4 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are
5 legally attributable to the other Defendants.

6 26. Defendants Diamond, Eric de Jong, and DOES 1-100 inclusive are hereinafter
7 collectively referred to as "Defendants."

8
9 **V.**
FACTUAL ALLEGATIONS

10 27. Defendants operate, and at all times during the Class Period, have done business in
11 San Diego County and elsewhere within California. At their work sites in San Marcos and elsewhere
12 in California, Defendants specialize in portable and temporary waste management and sanitation,
13 including but not limited to providing portable restrooms or "port-a-potties" at work sites throughout
14 the County. Defendants employ and have employed numerous Class Members, including Plaintiff,
15 to maintain these portable sanitation stations and restrooms in good working order. Each Class
16 Member worked for and was employed by Defendants as a Pumper Driver at one Defendants' work
17 sites. Plaintiffs are informed and believe and on that basis allege that, during the Class Period,
18 Defendants have employed in excess of 100 persons as Pumper Drivers.

19 28. Plaintiffs are informed and believe and on that basis allege that the Defendants'
20 regular and customary business practice is to hire Pumper Drivers who are of Hispanic, Latino, or
21 Mexican-American origin, who do not have a solid command of the English language, or who are
22 undocumented citizens of the United States. Plaintiffs are further informed and believe that
23 Defendants' hiring practice is intended to exploit the unsophisticated nature of the Company's
24 employees, since these Pumper Drivers are less likely to complain about being misclassified as an
25 exempt employee and are less likely to complain about not being paid for overtime.

26 29. Plaintiffs are informed and believe that Diamond Environmental Services, LLC has
27 enjoyed remarkable success and growth in the sanitation and waste management industry during the
28 past nearly ten years. Plaintiffs are further informed and believe that this success and growth has

1 come at the expense of the relatively unsophisticated Pumper Drivers who work long hours without
2 being paid overtime or doubletime.

3 A. Duties of Pumper Drivers.

4 30. Pumper Drivers report directly to and work under the close supervision of Diamond's
5 management employees, including Eric de Jong. Pumper Drivers' job duties do not entail significant
6 discretionary decision-making or the supervision of other employees.

7 31. The primary duty and essential function of a Pumper Driver is to attend shift
8 meetings, drive a truck to work sites through San Diego County to service portable restrooms, pump
9 waste from portable restrooms, clean portable restrooms, restock portable restrooms, and maintain
10 the service truck driven by the Pumper Driver.

11 32. At a minimum, the Class Members, including Plaintiffs, worked a ten (10) hour shift
12 at Defendants' work sties, Monday through Friday.

13 33. Because of their work duties and the nature of this position, the Class Members,
14 including Plaintiffs, do not fall within any of the exemptions to the overtime pay requirements of the
15 California Labor Code regarding meal breaks and waiting time penalties.

16 B. Failure to Pay Overtime Compensation to Pumper Drivers.

17 34. In conformance with the policy and practice of Defendants, the Class Members,
18 including Plaintiffs, are generally required to work in excess of ten (10) hours a day, Monday
19 through Friday. Additionally, the Class Members, including Plaintiffs, are often required to work
20 significant hours on Saturdays and/or Sundays. Plaintiffs and the Class Members regularly worked
21 in excess of fifty (50) to fifty-five (55) hours per week.

22 35. As alleged above, Defendants had, and continue to have, a policy and practice of
23 paying Class Members, including Plaintiffs, a fixed amount of "salary" each month, and not an
24 hourly wage.

25 36. Plaintiffs and the Class Members do not, and at all times during the Class Period did
26 not, receive any additional compensation from Defendants for hours worked in excess of forty (40)
27 hours in a week. Accordingly, Defendants had, and continue to have, a willful policy and practice
28 of requiring their Pumper Driver employees, including Plaintiffs, to work substantially in excess of

1 forty (40) hours per week without paying them proper overtime compensation as required by the
2 California's wage and hour laws and 29 U.S.C. § 207. This constitutes a separate and independent
3 violation of Business & Professions Code §§ 17200 et seq. since it constitutes an unlawful and unfair
4 business practice.

5 **C. Denial of Meal Periods to Pumper Drivers.**

6 37. During the Class Period, Defendants had, and continue to have, a policy and practice
7 of requiring the Class Members, including Plaintiffs, to work in excess of five (5) hours per day
8 without affording them a proper meal period of at least a half hour during which they are relieved
9 of all duties. Pumper Drivers are also regularly required by Defendants to work in excess of ten (10)
10 hours per day without being afforded an additional, second meal period of at least a half hour during
11 which they are relieved of all duties. This policy and practice does not comply with Labor Code §§
12 226.7 and 512, and I.W.C. Wage Order Nos. 4-2000 and 4-2001, and also constitutes a separate and
13 independent violation of California Business & Professions Code §§ 17200 et seq. since it
14 constitutes an unlawful and unfair business practice.

15 **D. Failure to Timely Pay Overtime Compensation and Wages Due.**

16 38. During the Class Period, Defendants had, and continue to have, a policy and practice
17 of not timely paying overtime compensation and other wages due and owing to the Class Members,
18 including Plaintiffs, within 72 hours of the conclusion of their employment with Defendants. This
19 policy and practice does not comply with Labor Code §§ 201-203, and also constitutes a separate and
20 independent violation of Business & Professions Code §§ 17200 et seq. since it constitutes an
21 unlawful and unfair business practice.

22 **E. Failure To Furnish Timely and Accurate Wage Statements**

23 39. During the Class Period, Defendants have failed to furnish each of their Pumper
24 Drivers with timely itemized wage statements accurately showing total hours worked by each
25 Pumper Driver.

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VI.
CLASS ALLEGATIONS

40. This action may properly be maintained as a class action pursuant to section 382 of the Code of Civil Procedure. The plaintiff class is sufficiently numerous, since it is estimated to include over one hundred Pumper Drivers throughout California, the joinder of whom in one action is impracticable, and the disposition of whose claims in a class action will provide substantial benefits to both the parties and the Court.

41. **Class Definition:** Without prejudice to later revision, the class which Plaintiffs seek to represent is composed of all persons who were employed as a "Pumper Driver" at any Diamond work site in the State of California (the "Class") during the period commencing from December 15, 2002 up until the date of trial (the "Class Period").

42. **Ascertainable Class:** The Class is ascertainable in that each member can be identified using information contained in Defendants' payroll and personnel records.

43. **Common Questions of Law or Fact Predominate:** There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented for each class. The questions of law and fact common to the Class predominate over questions which may affect individual Class members. These questions of law and fact include, but are not limited to, the following:

- (a) Whether Defendants were required by law to pay overtime compensation to Pumper Drivers who worked in excess of 40 hours per week and/or eight (8) hours a day;
- (b) Whether Defendants were required to pay members of the Class for rest periods not taken or allowed;
- (c) Whether Defendants were required to pay members of the Class for meal periods not taken or allowed;
- (d) Whether Defendants failed to keep accurate records of the hours of work of members of the Class;
- (e) Whether Defendants failed to timely furnish the members of the Class with a statement accurately showing the total hours the Pumper Driver worked each pay

1 period;

2 (f) Whether Defendants failed to pay overtime wages at the time the Class Members'
3 employment ended; and

4 (g) Whether Defendants' systematic acts and practices violated, *inter alia*, California
5 Labor Code §§ 201, 202, 221, 226, 226.7, 510, 512, 558, 1174, 1194 and 1197, and
6 California Business & Professions Code §§ 17200 *et seq.*

7 44. **Numerosity:** The Class is so numerous that the individual joinder of all members is
8 impractical under the circumstances of this case. While the exact number of members of the Class
9 is unknown to Plaintiffs at this time, Plaintiffs are informed and believe the Class consists of over
10 one hundred persons. Individual joinder of members of the Class is also impracticable because the
11 individual members are disbursed throughout California.

12 45. **Typicality:** Plaintiffs' and the Class Members' claims for restitution and damages
13 arise from and were caused by Defendants' wrongful conduct. Because Plaintiffs were Pumper
14 Drivers which required them to routinely work overtime and miss meal and rest periods, and because
15 they were not compensated for the overtime, meal and rest periods they worked, Plaintiffs are
16 asserting claims that are typical of the claims of each member of the Class. Plaintiffs are like all
17 other Class members because Plaintiffs have suffered the same injuries as those suffered by the
18 Class. Since Plaintiffs' claims and the claims of Class Members all derive from a common nucleus
19 of operative facts, Plaintiffs are asserting claims that are typical of the claims of the entire Class.

20 46. **Adequacy:** Plaintiffs will fairly and adequately represent and protect the interests
21 of the Class in that they have no disabling conflicts of interest that would be antagonistic to those
22 of the other members of the Class. Plaintiffs seek no relief that is antagonistic or adverse to the
23 members of the Class and the infringement of the rights and the damages they have suffered are
24 typical of all other members of the Class so that they will adequately represent the Class. Plaintiffs
25 have retained competent counsel experienced in class action litigation and employment law to further
26 ensure such protection and intends to prosecute this action vigorously.

27 47. **Superiority:** The nature of this action and the nature of laws available to Plaintiffs
28 and the Class make the use of the class action format a particularly efficient and appropriate

1 procedure to afford relief to Plaintiffs and the Class for the wrongs alleged because:

- 2 (a) The individual amounts of damages involved, while not insubstantial, are such that
3 individual actions or other individual remedies are impracticable and litigating
4 individual actions would be too costly;
- 5 (b) This case involves a large employer and a large number of individual employees with
6 many relatively small claims with common issues of law and fact;
- 7 (c) If each Class member were required to file an individual lawsuit, the Defendants
8 would necessarily gain an unconscionable advantage since they would be able to
9 exploit and overwhelm the limited resources of each individual member of the Class
10 with their vastly superior financial and legal resources;
- 11 (d) The costs of individual suits could unreasonably consume the amounts that would be
12 recovered;
- 13 (e) Requiring each member of the Class to pursue an individual remedy would also
14 discourage the assertion of lawful claims by employees who would be disinclined to
15 pursue an action against their present and/or former employer for an appreciable and
16 justifiable fear of retaliation and permanent damage to their immediate and/or future
17 employment;
- 18 (f) Proof of a common business practice or factual pattern which Plaintiffs experienced
19 is representative of that experienced by the Class and will establish the right of each
20 of the members to recover on the causes of action alleged; and
- 21 (g) Individual actions would create a risk of inconsistent results and would be
22 unnecessary and duplicative of this litigation.

23 48. Notice to the members of the Class may be made by first-class mail addressed to all
24 persons who have been individually identified by Defendants through access to Defendants' payroll
25 and personnel records. Alternatively, if Defendants cannot produce a list of members' names and
26 addresses, the members of the Class may be notified by publication in the appropriate media outlets,
27 and by posting notices in Defendants' places of business in the State of California.

28 49. Plaintiffs and the members of the Class have all similarly suffered irreparable harm

1 and damages as a result of Defendants' unlawful and wrongful conduct. This action will provide
2 substantial benefits to both Plaintiffs and Class and the public since, absent this action, Plaintiffs and
3 the members of the Class will continue to suffer losses, thereby allowing Defendants' violations of
4 law to proceed without remedy, and allowing Defendants to retain the proceeds of their ill-gotten
5 gains.

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8 **VII.**
9 **CAUSES OF ACTION**

10 **FIRST CAUSE OF ACTION**

11 **Failure to Pay Overtime Compensation**
12 **(Violation of California Labor Code §§ 510, 558, 1194 and 1197**
13 **and Wage Order Nos. 4-98 and 4-2000)**
14 **(Against All Defendants)**

15 50. Plaintiffs and the Class hereby incorporate by this reference each and every preceding
16 paragraph of this complaint as if fully set forth herein.

17 51. Pursuant to section 1194 of the Labor Code, Plaintiffs and the Class may bring a civil
18 action for overtime wages directly against the employer in Plaintiffs' name without first filing a
19 claim with the Division of Labor Standards Enforcement. Further, such private class actions have
20 the support and approval of the Division of Labor Standards Enforcement.

21 52. Pursuant to sections 510, 558, 1194 and 1197 of the Labor Code, among other
22 applicable sections, it is unlawful to employ persons for longer than the hours set by the Industrial
23 Welfare Commission or under conditions prohibited by the applicable Industrial Commission Wage
24 Orders and Federal Law, including but not limited to 29 U.S.C. § 207.

25 53. During and throughout the course of the Class Period, Plaintiffs and the Class were
26 compelled to work in excess of eight (8) hours per workday, in excess of forty (40) hours per
27 workweek, and on the seventh day of the workweek.

28 54. On each and every occasion in which Plaintiffs and the Class were compelled to work
in excess of eight (8) hours per workday, in excess of forty (40) hours per workweek, and for the first
eight (8) hours on the seventh day of the workweek, Defendants, and each of them, failed and refused
to compensate Plaintiffs and the Class at the rate of no less than one and one-half times the regular
rate of pay.

1 55. During and throughout the class period, Plaintiffs and the Class were compelled to
2 work in excess of twelve (12) hours per workday and in excess of eight (8) hours on the seventh day
3 of the workweek.

4 56. On each and every occasion in which Plaintiffs and the Class were compelled to work
5 in excess of twelve (12) hours per workday and in excess of eight (8) hours on the seventh day of
6 the workweek, Defendants, and each of them, failed and refused to compensate Plaintiffs at the rate
7 of no less than twice the regular rate of pay.

8 57. Defendants failed to retain the records of hours worked by Plaintiffs and the Class.
9 Defendants' failure to retain the records of hours worked by Plaintiffs and the Class is unfair and
10 willful and deliberate, and designed to serve the policy of unlawfully denying overtime compensation
11 to persons employed as Pumper Drivers. Moreover, by failing to keep adequate time records required
12 by Labor Code § 1174(d), Defendants have made it difficult to calculate the overtime compensation
13 due Plaintiffs and the Class.

14 58. Under the provisions of California's Labor Code and the applicable Wage Orders
15 Nos. 4-98 and 4-2000 issued by the Industrial Welfare Commission of California, Plaintiffs and the
16 Class should have received overtime wages in a sum according to proof for the hours they worked.

17 59. Defendants cannot provide records because they have failed and refused and continue
18 to fail and refuse to pay Plaintiffs and the Class the amounts owed and to keep accurate records in
19 violation of section 1174 of the California Labor Code.

20 60. Plaintiffs and the Class request recovery of overtime compensation according to
21 proof, plus penalty wages, interest, attorney's fees and costs pursuant to sections 203, 218.5, 510,
22 558, 1194 and 1197 of the Labor Code, the relevant California Industrial Welfare Commission Wage
23 Orders, or any other statutory, regulatory, or common law authority, as well as the assessment of any
24 other statutory penalties against Defendants, in a sum as provided by the California Labor Code and
25 other applicable California statutes and regulations and applicable Federal law.

26 61. The pattern, practice and uniform administration of corporate policy regarding illegal
27 employee compensation as described herein is unlawful, and Plaintiffs and the Class are entitled to
28 recover in a civil action for the unpaid balance of the full amount of the overtime premiums owing,

1 including interest thereon, penalties, reasonable attorney's fees and costs of suit according to the
2 mandate of the Labor Code.

3
4 **SECOND CAUSE OF ACTION**
5 **Failure to Pay Final Wages**
6 **(Violation of California Labor Code §§ 201 and 202)**
7 **(Against All Defendants)**

8 62. Plaintiffs and the Class hereby incorporate by this reference each and every preceding
9 paragraph of this complaint as if fully set forth herein.

10 63. Labor Code § 201 requires employers to furnish immediately the final wages of an
11 employee who is terminated from employment.

12 64. Labor Code § 202 requires employers to furnish the final wages of an employee who
13 quits within 72 hours of the resignation, unless the employee has provided 72 hours' notice of his
14 or her intention to quit, in which case the wages are due at the time of quitting.

15 65. As to those members of the Class (including Plaintiffs) whose employment ended by
16 either termination or resignation during the class period, Defendants, and each of them, have failed
17 and refused, and continue to fail and refuse, to provide those Class Members with their final wages,
18 including but not limited to overtime compensation earned while employed by Defendants during
19 the Class Period.

20 66. Accordingly, Defendants, and each of them, have wilfully failed to pay Plaintiffs and
21 the Class all wages due in accordance with Labor Code §§ 201 and 202.

22 67. As a result of such illegal conduct, Plaintiffs and the Class have suffered damages in
23 an amount to be proven at trial.

24 68. Pursuant to Labor Code § 218.5, Plaintiffs and the Class request that the court award
25 reasonable attorney's fees and costs incurred in this action, in addition to such other relief as may
26 be warranted.

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THIRD CAUSE OF ACTION**Waiting Time Penalties****(Violation of California Labor Code § 203)****(Against All Defendants)**

69. Plaintiffs and the Class hereby incorporate by this reference each and every preceding paragraph of this complaint as if fully set forth herein.

70. Defendants' failure to pay wages, as alleged above, was willful in that Plaintiffs and the Class earned all wages that are currently owed and the failure to pay said wages was without justification or excuse.

71. In denying Plaintiffs and the Class payment of the wages, Defendants acted wilfully, wantonly and intentionally. As such, Defendants' actions in not paying Plaintiffs and the Class wages owed is entirely in bad faith and warrants waiting time penalties.

72. Pursuant to the provisions of Labor Code § 203 and any other applicable statute or doctrine, Plaintiffs and those members of Class no longer employed by Defendants are entitled to a waiting time penalty equal to not less than 30 days' wages in an amount to be proven at trial.

FOURTH CAUSE OF ACTION**Failure to Provide Rest Periods****(Violation of California Labor Code § 226.7)****(Against All Defendants)**

73. Plaintiffs and the Class hereby incorporate by this reference each and every preceding paragraph of this complaint as if fully set forth herein.

74. At all times herein mentioned Plaintiffs and the Class were non-exempt employees and subject to the "rest period" provisions of the Industrial Welfare Commission. No valid legal or applicable exception to the rest period requirement existed to allow Defendants to avoid providing Plaintiffs and Class Members with regular rest period(s) as required by the Labor Code, wage orders and/or regulations.

75. From at least December 15, 2002 Defendants failed to allow members of the Class to take rest periods during every four hour period worked. The law requires that employees, such as those in the Plaintiffs' position, be allowed a ten minute break during every four hour work period. The prescribed break should be allowed, as close to the middle of the four hour period as possible, according to the Industrial Welfare Commission Wage Order 4-2001. Thus, Plaintiffs

1 and the Class should have been afforded a ten minute break at the two hour point of the four hour
 2 work periods. Defendants denied them such breaks and Defendants were well aware that rest
 3 periods were being denied to their hourly employees. Plaintiffs and the Class regularly work and
 4 have worked four hour shifts or longer without receiving the required ten minute breaks pursuant
 5 to Labor Code § 226.7(a), (8 Cal. Code Reg. §§ 11010-11150, ¶12 (Cal. Wage Order Nos. 1-
 6 2001-15-2001); 11160, ¶11 (Cal. Wage Order No. 16-2001). Wages are due to employees for
 7 "all hours worked" under IWC Order 7-2001 §4(A). "[R]est periods shall be counted as hours
 8 worked...." pursuant to IWC Order 4-2001 §12(A). Wages are due to the Plaintiffs to
 9 compensate for the "rest periods" that were denied under applicable laws, rules, requirements,
 10 and regulations. Ten minutes worth of prorated wages are due to the Plaintiffs, for each four
 11 hour work period contained in each day of work each Class Member performed, from December
 12 15, 2002 to the present. In addition, the Plaintiffs and Class are entitled to recover interest on the
 13 unpaid rest period wages due to them. Further, the Plaintiffs and Class demand reasonable
 14 attorneys fees and costs of suit, pursuant to Labor Code §218.5, plus all appropriate penalties for
 15 the wage and hour violations, including the one hour's compensation due under IWC Order 4-
 16 2001(B).

17 76. Plaintiffs and the Class request relief pursuant to Labor Code § 226.7(b) which
 18 provides for one hour of additional pay at the employees' regular rate of pay for each work day
 19 the rest period(s) is not provided.

20 **FIFTH CAUSE OF ACTION**
 21 **Failure to Allow Meal Periods**
 22 **(Violation of California IWC Order 7-2001)**
 23 **(Against All Defendants)**

24 77. Plaintiffs and the Class hereby incorporate by this reference each and every
 25 preceding paragraph of this complaint as if fully set forth herein.

26 78. At all times herein mentioned, Plaintiffs and the Class were non-exempt
 27 employees and subject to the "meal period" provisions of the Industrial Welfare Commission.
 28 No valid legal or applicable exception to the meal break requirement existed to allow Defendants
 to avoid providing Plaintiffs and Class Members with regular meal breaks as required by the

1 Labor Code.

2 79. From at least November 2002 to the present, Defendants failed to allow the
3 Plaintiffs and Class to take thirty (30) minute meal periods for every five (5) hours worked.
4 Defendants denied them such breaks and Defendants' agents and management were well aware
5 that rest/meal periods were being denied to their employees. Plaintiffs and Class Members
6 regularly work and have worked in excess of five (5) and ten (10) hours a day without being
7 afforded at least half-hour meal periods in which they were relieved of all duties as required by
8 Labor Code §§ 226.7, 512 and Wage Order No. 4-2000 ¶11(B). Defendants sometimes deprived
9 employees of both their lunch period and the thirty (30) minutes pay for the time when the
10 employees were working.

11 80. Wages are due to employees for "all hours worked" under IWC Order 4-2001
12 ¶4(A) and applicable laws, rules, orders, requirements, and regulations. Plaintiffs and Class
13 Members request relief pursuant to Labor Code § 226.7(b) which provides for one hour of
14 additional pay at the employees' regular rate of pay for each work day the meal break is not
15 provided. Plaintiffs and the Class demand all applicable reimbursement and penalties for their
16 lost meal breaks, including the one hour's compensation due under the Wage Order. Further,
17 Plaintiffs and the Class demand reasonable attorney's fees and costs of suit, pursuant to Labor
18 Code §218.5.

19 81. Under California law, meal periods must be recorded unless all operations cease
20 during the scheduled meal periods. In fact, Plaintiffs and the Class did not cease all operations
21 during scheduled meal periods. Plaintiffs and the Class are not only entitled to compensation for
22 the lost meal periods, but to the extent that Defendants claim that meal periods were taken which
23 are not documented, Plaintiffs and the Class also seek all applicable penalties for Defendants'
24 failure to keep accurate time records.

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SIXTH CAUSE OF ACTION
Failure to Furnish Timely and Accurate Wage Statements
(Violation of California Labor Code § 226)
(Against All Defendants)

82. Plaintiffs and the Class hereby incorporate by this reference each and every preceding paragraph of this complaint as if fully set forth herein.

83. Labor Code § 226(a) requires employers semi-monthly or at the time of each payment of wages to furnish each employee with a statement itemizing, inter alia, the total hours worked by the employee. Labor Code § 226(e) provides that if an employer knowingly and intentionally fails to provide a statement itemizing, inter alia, the total hours worked by the employee, then the employee is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial violation and one hundred dollars (\$100) for each subsequent violation, up to four thousand dollars (\$4000).

84. Defendants knowingly and intentionally failed to furnish and continue to knowingly and intentionally fail to furnish each Plaintiffs and Class Member with timely, itemized statements showing the total hours worked by each of them, as required by Labor Code § 226(a). As a result, Defendants are liable to Plaintiffs and Class Members for the amounts provided by Labor Code § 226.

SEVENTH CAUSE OF ACTION
Unlawful and Unfair Business Acts and Practices
(Violation of California Business & Professions Code §17200, *et seq.*)
(Against All Defendants)

85. Plaintiffs and the Class hereby incorporate by this reference each and every preceding paragraph of this complaint as if fully set forth herein.

86. The acts, omissions, and practices of Defendants as alleged herein constituted unlawful and unfair business acts and practices within the meaning of Section 17200, *et seq.* of the California Business & Professions Code.

87. Defendants have engaged in "unlawful" business acts and practices by Defendants' wrongful mis-classification of their Pumper Drivers and their nonpayment of overtime wages in violation of the statutes and regulations, referenced herein above, including California Labor Code §§ 201-203, 221, 226, 226.7, 510, 558, 1174, 1194, 1197, and 2802;

1 Business & Professions Code §§ 17200 et seq.; I.W.C. Wage Order Nos. 4-98, 4-2000, 7-2001;
2 and 29 U.S.C. §§ 207, and 211(c).

3 88. Plaintiffs reserve the right to allege other violations of law which constitute
4 unlawful acts or practices.

5 89. Defendants have also engaged in "unfair" business acts or practices in that the
6 harm caused by Defendants' wrongful mis-classification of Pumper Drivers and their
7 nonpayment of overtime wages outweighs the utility of such conduct and such conduct offends
8 public policy, is immoral, unscrupulous, unethical, deceitful and offensive, causes substantial
9 injury to Plaintiffs and the Class, and provides Defendants with an unfair competitive advantage
10 over those employers that abide by the law, properly classify their employees, and pay overtime
11 compensation in accordance with the law.

12 90. As a result of the conduct described above, Defendants have been and will be
13 unjustly enriched at the expense of Plaintiffs and the Class. Specifically, Defendants have been
14 unjustly enriched by the retention of hundreds of thousands, if not millions, of dollars in wages
15 earned and wrongfully withheld from Plaintiffs and the Class.

16 91. The aforementioned unlawful or unfair business acts or practices conducted by
17 Defendants have been committed in the past and continues to this day. Defendants have failed to
18 acknowledge the wrongful nature of their actions. Defendants have not corrected or publicly
19 issued individual and comprehensive corrective notices to Plaintiffs and the Class or provided
20 full restitution and disgorgement of all ill-gotten monies either acquired or retained by
21 Defendants as a result thereof, thereby depriving Plaintiffs and the Class the minimum working
22 conditions and standards due them under California Labor Laws, Industrial Welfare Commission
23 Wage Orders and the Fair Labor Standards Act of 1938.

24 92. Pursuant to the Section 17203 of the Business & Professions Code, Plaintiffs and
25 the Class seek an order of this Court requiring Defendants to disgorge all ill-gotten gains and
26 awarding Plaintiffs and the Class full restitution of all monies wrongfully acquired by Defendants
27 by means of such "unlawful" and "unfair" conduct, plus interest and attorneys' fees pursuant to,
28 *inter alia*, Section 1021.5 of the Code of Civil Procedure, so as to restore any and all monies to

1 Plaintiffs and the Class and the general public which were acquired and obtained by means of
2 such "unlawful" and "unfair" conduct, and which ill-gotten gains are still retained by Defendants.
3 Plaintiffs and the Class additionally request that such funds be impounded by the Court or that an
4 asset freeze or constructive trust be imposed upon such revenues and profits to avoid dissipation
5 and/or fraudulent transfers or concealment of such monies by Defendants. Plaintiffs and the
6 Class may be irreparably harmed and/or denied an effective and complete remedy if such an
7 order is not granted.

8 93. Pursuant to Section 17203 of the Business & Professions Code, Plaintiffs and the
9 Class seek an order of this Court for equitable and/or injunctive relief in the form of requiring
10 Defendants to classify their Pumper Drivers as non-exempt from overtime pay requirements, to
11 keep accurate records of time worked, and to insure the payment of earned overtime wages
12 henceforth.

13 VIII

14 PRAYER FOR RELIEF

15 WHEREFORE, Plaintiffs, on behalf of themselves, all present and former similarly
16 situated Class Members, and on behalf of the general public, request the following relief:

17 A. That the Court determine that this action may be maintained as a class
18 action under Code of Civil Procedure § 382;

19 B. That the Court find that Defendants have violated the overtime provisions of
20 Labor Code § 1194 and Wage Orders 4-98 and 4-2000 as to the Plaintiffs and the Class;

21 C. That the Court find that Defendants have violated the record-keeping provisions
22 of Labor Code § 1174(d) and section 7 of the Wage Orders as to Plaintiffs and the Class;

23 D. That the Court find that Defendants have violated Labor Code §§ 226.7, 512 and
24 Wage Order No. 4-2000 by failing to afford Plaintiffs and Class Members adequate meal periods;

25 E. That the Court find that Defendants have violated Labor Code § 226 by failing to
26 record, keep and timely furnish Plaintiffs and Class Members itemized statements accurately
27 showing the total hours worked by each of them;

28 F. That the Court find that Defendants have violated Labor Code §§ 201, 202 and

1 203 for willful failure to pay all compensation owed at the time of termination of employment to
2 Class Members;

3 G. That the Court find that Defendants have violated Business and Professions Code
4 §§ 17200 *et seq.* by failing to pay its Pumper Drivers overtime compensation and waiting period
5 penalties, by failing to keep proper time records, by failing to afford Pumper Drivers adequate
6 meal periods, and by failing to timely furnish Pumper Drivers with statements accurately
7 showing total hours worked;

8 H. That the Court find that Defendants' violations as described above are found to
9 have been willful;

10 I. That the Court award to Plaintiffs and the Class damages for the amount of unpaid
11 overtime compensation, including interest thereon, damages for failure to timely furnish
12 statements accurately showing total hours worked and penalties subject to proof at trial;

13 J. That Defendants be ordered and enjoined to pay restitution to Plaintiffs and the
14 Class due to Defendants' unlawful activities, pursuant to Business and Professions Code §§
15 17200-05;


16 K. That Defendants further be enjoined to cease and desist from unlawful activities in
17 violation of Business and Professions Code §§ 17200 *et seq.*;

18 L. That Plaintiffs and the Class be awarded reasonable attorneys' fees and costs
19 pursuant to Labor Code §§ 218.5, 226 and 1194, Code of Civil Procedure § 1021.5, and/or other
20 applicable law; and

21 M. That the Court award such other and further relief as this Court may deem
22 appropriate.

23
24 Dated: December 11, 2006

By:


Jason E. Baker, Esq.
KEEGAN MACALUSO & BAKER, LLP
Attorneys for Plaintiffs and Class

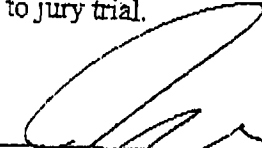
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DEMAND FOR JURY TRIAL

Plaintiffs and Class Members hereby demand a jury trial on all causes of action and claims with respect to which they have a right to jury trial.

Dated: December 11, 2006

By:


Jason E. Baker, Esq.
KEEGAN MACALUSO & BAKER, LLP
Attorneys for Plaintiffs and Class

1 JOHN S. ADLER, Bar No. 060398
2 LITTLER MENDELSON
3 A Professional Corporation
4 501 W. Broadway
5 Suite 900
6 San Diego, CA 92101.3577
7 Telephone: 619.232.0441

8 Attorneys for Defendants
9 DIAMOND ENVIRONMENTAL SERVICES, LLC
10 AND ERIC DE JONG

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO – NORTH COUNTY

JUAN MENDOZA and AGUSTIN
FERNANDEZ, individually and on behalf
of all other persons similarly situated and
on behalf of the general public,

Plaintiffs,

v.

DIAMOND ENVIRONMENTAL
SERVICES, LLC, a California limited
liability company; ERIC DE JONG, an
individual; and DOES 1 through 100,
inclusive,

Defendants.

Case No. GIN 057664

Assigned to:
The Honorable Michael B. Orfield
Dept. 28

**DEFENDANTS' ANSWER TO
PLAINTIFFS' COMPLAINT**

Complaint Filed: December 11, 2006

Defendants DIAMOND ENVIRONMENTAL SERVICES, LLC and ERIC DE
JONG (hereinafter jointly referred to as "Defendants") submit the following response to the
unverified Complaint ("Complaint") filed by Plaintiffs JUAN MENDOZA and AGUSTIN
FERNANDEZ ("Plaintiffs").

GENERAL DENIAL

Pursuant to the provisions of Code of Civil Procedure section 431.30(d), Defendants,
and each of them, deny generally and specifically each and every allegation contained in Plaintiffs'
Complaint. In addition, Defendants deny that Plaintiffs, or any of them, have sustained, or will
sustain, any loss or damage in the manner or amount alleged, or otherwise, by reason of any act or
omission, or any other conduct or absence thereof on the part of Defendants, or either of them.

Firmwide: 81875103.1 053586.1001

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Defendants each allege that the Complaint, and each and every alleged claim therein, fails to state facts sufficient to constitute a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Defendants each allege that each Plaintiff has failed, refused and/or neglected to mitigate or avoid the damages complained of in the Complaint, if any.

THIRD AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Defendants each allege that each Plaintiff's claims, to the extent allowable by law, are barred by the doctrines of waiver, unclean hands, estoppel and/or laches.

FOURTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Defendants each allege that each Plaintiff is not entitled to equitable relief insofar as he has an adequate remedy at law.

FIFTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Defendants each allege that the Complaint and each and every claim alleged therein is barred by all applicable statutes of limitations, including but not limited to, Code of Civil Procedure sections 338, 339, 340, California Business and Professions Code section 17208, and 29 U.S.C. section 255, and other applicable statutes of limitations.

SIXTH AFFIRMATIVE DEFENSE

As a separate and distinct affirmative defense, Defendants each allege that each Plaintiff, and Plaintiffs collectively, has not and cannot satisfy the requirements for proceeding in a collective action under the provisions of section 382 of the California Code of Civil Procedure on behalf of others "similarly situated."

1 SEVENTH AFFIRMATIVE DEFENSE

2 As a separate and distinct affirmative defense, Defendants each allege that each
3 Plaintiff and all alleged potential class members have been paid and/or received all wages due to
4 them by virtue of their employment with Defendants, and each of them.

5 EIGHTH AFFIRMATIVE DEFENSE

6 As a separate and distinct affirmative defense, Defendants each allege that each
7 Plaintiff, and Plaintiffs collectively, lack standing to file and/or prosecute this action against any
8 Defendant and/or to receive any attorneys' fees.

9 NINTH AFFIRMATIVE DEFENSE

10 As a separate and distinct affirmative defense, Defendants each allege that the
11 Complaint fails to properly state a claim for attorney's fees under California Labor Code sections
12 218.5 and 1194(a), California Business and Professions Code section 17200, *et seq.*, or any other
13 basis.

14 TENTH AFFIRMATIVE DEFENSE

15 As a separate and distinct affirmative defense, Defendants each are informed and
16 believes and based thereon alleges that each Plaintiff was treated fairly and in good faith, and that
17 Defendants, and each of them, acted in good faith at all times alleged in the Complaint, and at no
18 time did any Defendant engage in unfair or deceptive business practices.

19 ELEVENTH AFFIRMATIVE DEFENSE

20 As a separate and distinct affirmative defense, Defendants each allege each Plaintiff's
21 alleged injuries were not proximately caused by any unlawful policy, custom, practice and/or
22 procedure promulgated and/or tolerated by any Defendant.

23 TWELFTH AFFIRMATIVE DEFENSE

24 As a separate and distinct affirmative defense, Defendants each allege that, assuming
25 *arguendo*, any Plaintiff is entitled to recover additional compensation on behalf of himself and/or
26 others, Defendants have not willfully or intentionally failed to pay such additional compensation,
27 and as such, liquidated damages should not be awarded and only a two-year statute of limitations
28

1 should apply under the Fair Labor Standards Act, or such other statute of limitations limits the time
2 for any recovery hereunder.

3 THIRTEENTH AFFIRMATIVE DEFENSE

4 As a separate and distinct affirmative defense, Defendants each allege that each
5 Defendant has not willfully failed to pay any Plaintiff any wages, and there is a bona fide, good faith
6 dispute with respect to each Defendant's obligation to pay any wages that may be found to be due.

7 FOURTEENTH AFFIRMATIVE DEFENSE

8 As a separate and distinct affirmative defense, Defendants each allege that each
9 Plaintiff's causes of action and/or claim for, or based upon, a violation of Labor Code section 226.7
10 fails and/or recovery is limited as a matter of law because the one-hour-of-pay remedy for meal and
11 rest period violations is a penalty, not wages, and therefore, the claim has a one year statute of
12 limitations under California Code of Civil Procedure Section 340(a).

13 FIFTEENTH AFFIRMATIVE DEFENSE

14 As a separate and distinct affirmative defense, Defendants each allege that each
15 Plaintiff does not, and cannot, fairly and adequately represent the interests of the purported class.

16 SIXTEENTH AFFIRMATIVE DEFENSE

17 As a separate and distinct affirmative defense, Defendants each allege that each
18 Plaintiff's claim for penalties is barred because each Defendant acted in good faith and reasonably
19 believed that its conduct was lawful.

20 SEVENTEENTH AFFIRMATIVE DEFENSE

21 As a separate and distinct affirmative defense, Defendants each allege that
22 certification of a class, as applied to the facts and circumstances of this case, would constitute a
23 denial of each Defendant's procedural rights and right to trial by jury and to substantive and
24 procedural due process, in violation of the Fourteenth Amendment of the United States Constitution
25 and the Due Process and Equal Protection Clauses of the California Constitution.

26 EIGHTEENTH AFFIRMATIVE DEFENSE

27 As a separate and distinct affirmative defense, Defendants each allege that this suit
28 may not be properly maintained as a class action because: (1) Plaintiffs, and each of them, have

1 failed to plead, and cannot establish, the necessary procedural elements for class treatment; (2) a
 2 class action is not an appropriate method for the fair and efficient adjudication of the claims
 3 described in the Complaint; (3) common issues of fact or law do not predominate and, to the
 4 contrary, individual issues predominate; (4) Plaintiffs' claims are not representative or typical of the
 5 claims of the putative class; (5) Plaintiffs are not a proper class representative; (6) Plaintiffs and their
 6 counsel of record are not adequate representatives for the alleged putative class; (7) Plaintiffs cannot
 7 satisfy any of the requirements for class action treatment, and class action treatment is neither
 8 appropriate nor constitutional; (8) there is not a well-defined community of interest in the questions
 9 of law or fact affecting Plaintiffs and the members of the alleged putative class; (9) the alleged
 10 putative class is not ascertainable, nor are its members identifiable; and (10) to the extent that the
 11 alleged putative class is ascertainable and its members are identifiable, the number of putative class
 12 members is too small to meet the numerosity requirement for a class action.

13 NINETEENTH AFFIRMATIVE DEFENSE

14 As a separate and distinct affirmative defense, Defendants each allege that the
 15 adjudication of the claims of the putative class through generalized classwide proof violates each
 16 Defendant's rights to a trial by jury guaranteed by the United States and California Constitutions.

17 TWENTIETH AFFIRMATIVE DEFENSE

18 As a separate and distinct affirmative defense, Defendants each allege that each
 19 Plaintiff cannot recover lost wages, penalties or other monetary remedies under Business and
 20 Professions Code section 17200 *et seq.*

21 TWENTY-FIRST AFFIRMATIVE DEFENSE

22 As a separate and distinct affirmative defense, Defendants each allege that each
 23 Plaintiff is not entitled to an award of prejudgment interest if he prevails on any or all of his claims.

24 TWENTY-SECOND AFFIRMATIVE DEFENSE

25 As a separate and distinct affirmative defense, Defendants each allege that the
 26 Complaint fails to properly state facts sufficient to entitle each Plaintiff or putative class members to
 27 any relief, including, but not limited to, its failure to properly state facts sufficient to identify any
 28 actual or threatened harm to each Plaintiff beyond pure speculation, its failure to allege facts

1 showing that each Plaintiff has no adequate remedy at law, and its proposal of relief that would
 2 impose an undue burden on both Defendants and the Court and be so uncertain as to be wholly
 3 unenforceable.

4 TWENTY-THIRD AFFIRMATIVE DEFENSE

5 As a separate and distinct affirmative defense, Defendants each allege that each
 6 Plaintiff has failed to allege sufficient facts to state a claim upon which punitive damages may be
 7 awarded.

8 TWENTY-FOURTH AFFIRMATIVE DEFENSE

9 As a separate and distinct affirmative defense, each Defendant alleges that each of
 10 Plaintiff's claims and causes of action are barred either in whole or in part by collateral estoppel, res
 11 judicata and/or judicial estoppel in that the matters complained of herein were, in whole or in part,
 12 the subject of government inquiry and resolved by and through said governmental process.
 13 Additionally, each Defendant alleges that this civil action cannot be maintained because the
 14 exclusive method by which the administrative findings of the government can be contested is by
 15 administrative review and/or writ of mandate and/or such other internal or judicial process.

16 TWENTY-FIFTH AFFIRMATIVE DEFENSE

17 Plaintiffs' right to seek and/or obtain relief herein, if any, is barred by Plaintiffs'
 18 failure to proceed by way of internal administrative review and/or by writ of mandate and/or by a
 19 failure of Plaintiffs to exhaust administrative or internal remedies to challenge the actions of each
 20 Defendant and/or all of the Defendants herein.

21 TWENTY-SIXTH AFFIRMATIVE DEFENSE

22 Defendants are informed and believe, and on that basis allege, that the Complaint, and
 23 each purported claim contained therein, is barred by the doctrines of release and/or accord and
 24 satisfaction.

25 TWENTY-SEVENTH AFFIRMATIVE DEFENSE

26 Defendants are informed and believe, and on that basis allege, that the conduct of
 27 Defendants as alleged in the Complaint was justified and privileged under the circumstances.
 28

1 TWENTY-EIGHTH AFFIRMATIVE DEFENSE

2 Defendants are informed and believe, and on that basis allege, that the Complaint, and
3 each purported claim contained therein, is barred pursuant to the doctrine of avoidable
4 consequences.

5 TWENTY-NINTH AFFIRMATIVE DEFENSE/

6 Each Defendant is informed and believes, and on that basis allege, that the Complaint,
7 and each purported claim contained therein, is barred as to Defendant de Jong because said
8 Defendant was not the "employer" of any Plaintiff under California or federal law.

9 THIRTIETH AFFIRMATIVE DEFENSE

10 Each Defendant is informed and believes, and on that basis alleges, that the
11 Complaint, and each purported claim contained therein, is barred as to Defendant de Jong because
12 Plaintiffs had no employment relationship with said Defendant, nor is said Defendant responsible for
13 the claims asserted by Plaintiffs.

14 THIRTY-FIRST AFFIRMATIVE DEFENSE

15 Each Defendant is informed and believes, and on that basis alleges, that each Plaintiff
16 is barred from obtaining relief pursuant to the causes of action for violation of California Business
17 and Professions Code section 17200, *et seq.* to the extent each Plaintiff cannot act as private attorney
18 generals.

19 THIRTY-SECOND AFFIRMATIVE DEFENSE

20 As a separate and distinct affirmative defense, each Defendant alleges that to the
21 extent any sum is found due and owing to any Plaintiff and/or Class Member herein, each Defendant
22 is entitled to a set-off against said sum to the extent paid, tendered, waived, compromised and/or
23 released prior to the adjudication herein, including but not limited to those amounts paid, tendered,
24 waived, compromised and/or released through any governmental inquiry, investigation, enforcement
25 action or other proceeding.

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ADDITIONAL DEFENSES

Defendants do not presently know all facts with respect to the conduct alleged by Plaintiffs sufficient to state all affirmative defenses at this time. Defendants each reserve the right to amend this Answer should it/he later discover facts demonstrating the existence of additional affirmative defenses.

WHEREFORE, each Defendant prays that:

1. The Complaint be dismissed in its entirety with prejudice and each Plaintiff take nothing by his Complaint;
2. Judgment be entered against each Plaintiff and in favor of each Defendant;
3. Defendants each be awarded its/his costs of suit and reasonable attorneys' fees incurred herein; and
4. The Court award each Defendant such other and further relief as it deems appropriate.

Dated: January 5, 2007



JOHN S. ADLER
LITTLER MENDELSON
A Professional Corporation
Attorneys for Defendants
DIAMOND ENVIRONMENTAL SERVICES,
LLC AND ERIC DE JONG

PROOF OF SERVICE BY PERSONAL DELIVERY

I am employed by WorldWide Network in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 701 "B" Street, Suite 324, San Diego, California 92101. On January 8, 2007, I personally served:

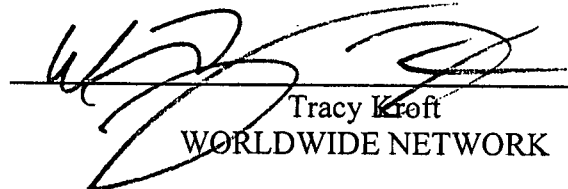
DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT

by delivering copies thereof to:

Jason E. Baker, Esq. Peter Karvelis, Esq. Brent Jex, Esq. Keegan, Macaluso & Baker, LLP 4370 La Jolla Village Drive, Suite 640 San Diego, CA 92122	Attorneys for Plaintiffs JUAN MENDOZA and AGUSTIN FERNANDEZ, et al. Phone: 858-552-6750 Fax: 858-552-6749
---	---

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 8, 2007, at San Diego, California.


Tracy Kroft
WORLDWIDE NETWORK

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 501 W. Broadway, Suite 900, San Diego, California 92101.3577. On January 9, 2007, I served the within document(s):

1. CIVIL COVER SHEET
2. NOTICE TO FEDERAL COURT OF REMOVAL OF CIVIL ACTION
3. DECLARATION OF JOHN S. ADLER REGARDING NOTICE TO STATE COURT OF REMOVING OF CIVIL ACTION TO FEDERAL COURT
4. DEFENDANTS' NOTICE OF PARTY WITH FINANCIAL INTEREST
5. NOTICE OF RELATED CASES

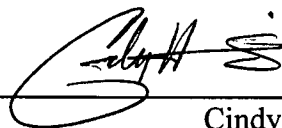
BY PERSONAL SERVICE. I caused to be delivered by hand to the offices of the above addressee(s) the document(s) specified above.

Jason E. Baker, Esq.
 Peter Karvelis, Esq.
 Brent Jex, Esq.
 Keegan, Macaluso & Baker, LLP
 4370 La Jolla Village Drive, Suite 640
 San Diego, CA 92122

Attorneys for Plaintiffs
 JUAN MENDOZA and
 AGUSTIN FERNANDEZ, et al.
 Phone: 858-552-6750
 Fax: 858-552-6749

I am readily familiar with the firm's practice of collection and processing correspondence for courier delivery service. Under that practice it would be hand delivered by a local courier service before close of business on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on January 9, 2007, at San Diego, California.



Cindy L. Lewis

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

JUAN MENDOZA and AGUSTIN FERNANDEZ, individually and on behalf of all other persons similarly situated and on behalf of the general public

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

JAMES E. BAKER, ESQ., Bar No. 197666

PETER KARVELIS, ESQ., Bar No. 216299

BRENT JEX, ESQ., Bar No. 235251

KEEGAN, MACALUSO & BAKER, LLP

4370 La Jolla Village Drive, Suite 640

San Diego, CA 92122

Tel: (858) 552-6750 Fax: (858) 552-6749

DEFENDANTS

DIAMOND ENVIRONMENTAL SERVICES, LLC, a California limited liability company; ERIC DE JONG, an individual; and DOES 1 THROUGH 100, inclusive

County of Residence of First Listed 2007 JAN -9 PM 1:43

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED. SOUTHERN DISTRICT OF CALIFORNIA

Attorneys (If Known)

JOHN S. ADLER, ESQ., Bar No. 060398 PM

LITTLER MENDELSON, P.C.

DEPUTY

501 West Broadway, Suite 900

San Diego, CA 92101-3577

Tel: (619) 232-0441

Fax: (619) 232-4302

'07CV 0056BTM POR

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

V. ORIGIN

(Place an "X" in One Box Only)

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 USC §§ 1441 and 1446

Brief description of cause:

Class Action - wage and hour violations alleged

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

1-8-07

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # 133684 AMOUNT \$250 APPLYING IFP

JUDGE

MAJ. JUDGE American Legal Net, Inc. www.USCourtForms.com

Jan 11/9/07

UNITED STATES
DISTRICT COURT
Southern District of California
San Diego Division

133684 - 43
January 9, 2007

Code	Case #	Qty	Amount
CV066000	3-07-CV-0056		60.00 CH
Judge	- HOSKOTTE		
CV066000			100.00 CH
CVS10000			190.00 CH

Total -> 350.00

FROM: CIVIL FILING
JUAN MENDOZA ET AL V. SICHOM
ENVIRONMENTAL SERVICES, LT (C)
903 905267